

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

JOSEPH M. ARPAIO, :  
 :  
Plaintiff, :CA No. 14-1966  
 :  
v. :  
 :  
BARACK OBAMA, et al, :  
 :  
Defendants. :  
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TRANSCRIPT OF MOTIONS HEARING  
BEFORE THE HONORABLE BERYL A. HOWELL  
UNITED STATES DISTRICT JUDGE  
Monday, December 22, 2014

APPEARANCES:

For the Plaintiff: FREEDOM WATCH  
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Proceedings reported by machine shorthand, transcript  
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1 P R O C E E D I N G S

2 DEPUTY CLERK: Matter before the Court, Civil  
3 Action 14-1966, Joseph M. Arpaio v. Barack Obama, et al.  
4 Counsel please come forward and identify yourselves for  
5 the record.

6 MR. KLAYMAN: Good morning, Your Honor. Larry  
7 Klayman, nice to see you.

8 THE COURT: Yes, nice to see you, Mr. Klayman.  
9 How are you?

10 MR. KLAYMAN: Good. I wanted to ask permission,  
11 I have my paralegal and counsel sitting at the table with  
12 me. Counsel is from Virginia. He's a Virginia lawyer.  
13 His name is Jon Moseley.

14 THE COURT: Good morning, Mr. Moseley.

15 MR. KLAYMAN: My paralegal's name is Dina James.

16 THE COURT: What's your paralegal's name?

17 MR. KLAYMAN: Dina James.

18 THE COURT: That's absolutely fine.

19 MR. KLAYMAN: Thank you.

20 THE COURT: And for the government.

21 MS. HARTNETT: Good morning, Your Honor.

22 Kathleen Hartnett from the Civil Division at the  
23 Department of Justice for the defendants.

24 THE COURT: Yes, I saw your notice last night,  
25 Ms. Hartnett.

1 MS. HARTNETT: Yes.

2 THE COURT: Am I pronouncing that correctly?

3 MS. HARTNETT: Yes, Your Honor.

4 THE COURT: Good morning, Ms. Hartnett.

5 MS. HARTNETT: With me at counsel table is Adam  
6 Kirschner from the Federal Programs Branch at the  
7 Department of Justice.

8 THE COURT: Good morning, Mr. Kirschner. All  
9 right.

10 So this morning I have in front of me two  
11 motions: the plaintiff's motion for preliminary  
12 injunction and the government's motion for dismissal for  
13 lack of subject matter jurisdiction under Federal Rule of  
14 Civil Procedure 12(b)(1). So why don't we start with you,  
15 Mr. Klayman.

16 MR. KLAYMAN: Thank you, Your Honor.

17 THE COURT: Since yours was the first motion  
18 filed.

19 MR. KLAYMAN: Does Your Honor have any timing  
20 limitations?

21 THE COURT: None.

22 MR. KLAYMAN: None, okay. Thank you.

23 THE COURT: We can go on as long as I have  
24 questions.

25 MR. KLAYMAN: Okay.

1 THE COURT: Or you have things to say.

2 MR. KLAYMAN: I look forward to it, questions.

3 Your Honor, this is a case at the pinnacle of  
4 national importance. It's not really just a question  
5 about immigration enforcement. It's a question about our  
6 Constitution. It's a question about whether the president  
7 can override Congress, go around Congress. And that's why  
8 this is so important. It reminds me of another case that  
9 I had the privilege of arguing about a year ago before  
10 Judge Leon, which was involving the NSA where he granted a  
11 preliminary injunction, and that's what we're seeking  
12 here.

13 THE COURT: Mr. Klayman, I did see reference in  
14 some parts of your brief to unlawful surveillance,  
15 warrantless unlawful surveillance and why it was in the  
16 public interest to grant the preliminary injunction.

17 MR. KLAYMAN: Perhaps it's on my mind. That was  
18 a brief that we filed, and then we filed a correction  
19 immediately after that. We were taking a little bit from  
20 a prior brief.

21 THE COURT: All right. So you filed a  
22 correction, I can see that. So you had success with one  
23 brief in front of another judge across the hall so you  
24 thought why not --

25 MR. KLAYMAN: Give it a try.

1 THE COURT: Give it a try, got it. Does that  
2 explain why I've got two motions for preliminary  
3 injunctions from you?

4 MR. KLAYMAN: That's correct.

5 THE COURT: One docketed at ECF 6 and one at ECF  
6 7?

7 MR. KLAYMAN: That's correct.

8 THE COURT: All right. I just wanted to make  
9 sure --

10 MR. KLAYMAN: The latter one is the one that  
11 governs. We picked that up a few minutes after it was  
12 filed.

13 THE COURT: I got it, okay, thank you.

14 MR. KLAYMAN: I appreciate you bringing that to  
15 the record's attention.

16 Your Honor, on March 28, 2011, President Obama  
17 stated to the American people, "America is a nation of  
18 laws, which means that I as president am obligated to  
19 enforce the law. I don't have a choice about that.  
20 Congress passes a law. The Executive Branch's job is to  
21 enforce and implement these laws and then the judiciary to  
22 interpret the laws. There are enough laws on the books by  
23 Congress that are very clear in terms of how we have to  
24 enforce our immigration system."

25 THE COURT: Mr. Klayman, I've heard that speech

1 and I've also seen it referenced in papers, so there's no  
2 need for you to be repeating things. I have read the  
3 papers quite thoroughly, and so let's hear from you about  
4 things that you want to supplement your papers with since,  
5 even though I've said there's no time limit, I also don't  
6 want to repeat everything that's in the papers.

7 MR. KLAYMAN: I understand that. I wanted to --

8 THE COURT: Let me just ask you because there  
9 are a couple things that I wanted to be clear about in my  
10 own mind. The plaintiff's supplemental declaration that  
11 was filed on December 19<sup>th</sup> states in Paragraph 9 that he  
12 seeks an injunction, and I quote, "on behalf of not just  
13 myself and my office but all of the American people,"  
14 which really addressed one of the questions I had in this  
15 case about whether Joseph Arpaio was suing, you know, in  
16 his personal capacity as a citizen of the United States or  
17 only in his official capacity as sheriff of Maricopa  
18 County or both.

19 MR. KLAYMAN: He's suing as both, Your Honor.

20 THE COURT: All right.

21 MR. KLAYMAN: As we set forth in this affidavit,  
22 and I might add we're not seeking an injunction for all of  
23 the American people. It will have that impact, of course,  
24 in terms of precedent, but he's representing the people of  
25 Maricopa County.

1 THE COURT: Okay. So his entire affidavit is  
2 all about -- and the reason I was confused is because his  
3 affidavits that you filed on his behalf are all about the  
4 harms to his office. And so, you know, I was a little bit  
5 confused in terms of the framing of the caption of the  
6 complaint and some of his statements in the declaration,  
7 including the one I just read about whether he was also  
8 complaining in his personal capacity. If he is suing in  
9 his personal capacity, on what basis would he have  
10 standing?

11 MR. KLAYMAN: Yes. I would look at Paragraph 40  
12 of that affidavit, Your Honor. He's suing in part  
13 because --

14 THE COURT: You're talking about the  
15 supplemental affidavit?

16 MR. KLAYMAN: Supplemental affidavit. Because  
17 he himself has been threatened. He himself has been  
18 threatened by individuals on the basis of his stance on  
19 immigration.

20 THE COURT: Okay. Well, that leads me to my  
21 next question. If he's suing because of -- you're  
22 talking, for example, about the notice that you filed just  
23 last night about the bomb threats, which was the press  
24 release from Maricopa County about bomb threats to the  
25 plaintiff in this case, that's the nature of the personal

1 injury to him?

2 MR. KLAYMAN: In part, and there's another  
3 report which incorporates by reference into his affidavit  
4 which is attached as Exhibit 5 to that affidavit where an  
5 individual threatened him with death on the basis that his  
6 family was deported as a result of actions that were  
7 taken.

8 THE COURT: But if I read your notice last  
9 night, for example, it says specifically in the press  
10 release issued by the plaintiff and his office that the  
11 reason he received the death threats is because of his  
12 widely known stance regarding illegal immigration, and if  
13 that's the case, is there anything I could do here that  
14 would change the plaintiff's widely known stance on  
15 illegal immigration that would stop him from being  
16 threatened?

17 MR. KLAYMAN: Well, there's a nexus here, and it  
18 doesn't have to be an absolute nexus. In terms of  
19 standing, I think you asked me the standing question --

20 THE COURT: Let's hear your explanation of that  
21 nexus.

22 MR. KLAYMAN: Yes. The fact that he has himself  
23 filed this complaint which is seeking to enforce the  
24 immigration laws as they currently exist exacerbates a  
25 pre-existing condition where he's viewed as -- and he's



1 not because I know him quite well; he's a client as well  
2 as a friend. The image that's been created by some in the  
3 media, in particular, that he's anti-immigrant, he's not  
4 anti-immigrant, but he's been viewed as anti-illegal  
5 immigrant, people have threatened him repeatedly. There  
6 are protests going on as we speak in front of his  
7 sheriff's office in Phoenix today as a result of this  
8 complaint. And there is -- and you'll probably see press  
9 reports about that -- but there is a substantial  
10 likelihood that he will be threatened with severe bodily  
11 injury or death as a result of simply filing this case and  
12 trying to enforce the immigration laws.

13 THE COURT: Mr. Klayman, I come back again to  
14 the evidence that you have submitted, you have submitted  
15 in this case with statements issued by the sheriff's  
16 office, and I'm reading page 2 of the document docketed at  
17 ECF 21-1, page 2, "All three aforementioned threats  
18 against Arpaio came as a result of the sheriff's widely  
19 known stance on illegal immigration," and I take it that  
20 there's nothing that I can say or do that is going to  
21 change his widely known stance on illegal immigration  
22 which he says was the cause of the threats. Am I correct  
23 on that?

24 MR. KLAYMAN: That's one cause of the threats.  
25 And if you look at the actual attachments, Your Honor, the

1 exhibits, Exhibit 5 for instance, is that he was  
2 threatened with severe bodily injury or death by someone  
3 who as a result of his actions had his family deported  
4 from this country. What we are arguing in this case and  
5 the position that he's taken throughout is that we should  
6 enforce the immigration laws. He hands illegal aliens  
7 over to ICE --

8 THE COURT: Well --

9 MR. KLAYMAN: -- for deportation, yet they come  
10 back into his jail.

11 THE COURT: Okay. So I want to ask, just like I  
12 was a little puzzled by your papers about whether the  
13 plaintiff was suing in his personal or official capacity  
14 or both, I want to be clear about precisely what policies  
15 you're challenging here, Mr. Klayman. You have a broad  
16 phrase that you used, "the president's immigration  
17 policies." That just doesn't cut it for me when you're  
18 asking me to enjoin from the bench with the strike of my  
19 pen some national programs. I have to be absolutely clear  
20 what is it precisely you're asking me to challenge, you're  
21 asking me to enjoin and stop.

22 So let me be clear --

23 MR. KLAYMAN: Certainly.

24 THE COURT: -- and ask you to be clear about it.

25 So this is what I understand based on your

1 papers that you're challenging the policies that are  
2 announced in two memoranda: the memorandum from Janet  
3 Napolitano issued on June 15, 2012, entitled Exercising  
4 Prosecutorial Discretion With Respect to Individuals Who  
5 Came to the United States as Children, which I am going to  
6 refer to, as the parties do in their papers, as the DACA  
7 program, D-A-C-A.

8 You're also challenging the programs outlined in  
9 a memorandum from Secretary of Homeland Security Jeh  
10 Johnson, dated November 20, 2014, titled Exercising  
11 Prosecutorial Discretion With Respect to Individuals Who  
12 Came to the United States as Children and With Respect to  
13 Certain Individuals Who Are the Parents of U.S. Citizens  
14 or Permanent Residents. I'll call that program, as the  
15 parties do, the DAPA program, D-A-P-A. And the revisions  
16 to the DACA program, as the parties do in their papers.

17 So as I understand it, you're challenging the  
18 DACA program, the 2014 revisions to the DACA program and  
19 the DAPA program.

20 MR. KLAYMAN: That's correct.

21 THE COURT: Do I have that right?

22 MR. KLAYMAN: You do.

23 THE COURT: All right. So you are not  
24 challenging the policies that are announced, for example,  
25 because I take it that there were about ten memoranda that

1 were issued by Secretary Johnson on November. You're not  
2 challenging, for example, the memorandum from DHS  
3 Secretary Jeh Johnson titled Expansion of the Provisional  
4 Waiver Program which allows, I guess, some eligible  
5 immigrants to travel overseas. You're not challenging  
6 that; is that correct?

7 MR. KLAYMAN: Correct.

8 THE COURT: And you're not challenging the  
9 memorandum on the same date, November 20, 2014, from the  
10 Secretary of DHS titled Policies for the Apprehension,  
11 Detention and Removal of Undocumented Immigrants, which as  
12 I've read it defines the priorities 1, 2 and 3 for the  
13 undocumented immigrants who are the priorities for federal  
14 enforcement authority. Am I correct on that?

15 MR. KLAYMAN: You're correct.

16 THE COURT: And you're also not challenging the  
17 memorandum of the same date, November 20, 2014, by the  
18 Secretary of Homeland Security entitled Policies  
19 Supporting U.S. High-Skilled Business and Workers. Is  
20 that correct?

21 MR. KLAYMAN: Correct, Your Honor.

22 THE COURT: So we're really down to these DACA  
23 program, DACA revisions program and the DAPA program. Is  
24 that right?

25 MR. KLAYMAN: That is right.

1 THE COURT: So with respect to the DACA program,  
2 which has been in effect since 2012, two years, how is it  
3 that you can show any kind of irreparable harm since it's  
4 taken you two years to challenge that program?

5 MR. KLAYMAN: What's set forth in the  
6 supplemental affidavit of Sheriff Arpaio is that since  
7 this new executive order has a memorandum, whatever you  
8 want to call it, it's kind of murky as to what the  
9 president did through DHS, but it is in effect an  
10 executive action in any event, and the president admits  
11 that.

12 THE COURT: What's murky about it?

13 MR. KLAYMAN: Well, they call them memoranda  
14 rather than executive orders. Executive orders would  
15 ordinarily come out as an executive order. But we believe  
16 that for political purposes, because the president doesn't  
17 want to exceed the numbers of executive orders issued by  
18 other presidents, he's calling them memoranda right now  
19 and it's being implemented through the Department of  
20 Homeland Security.

21 THE COURT: Well, doesn't the president affect  
22 policy over the sprawling federal bureaucracy in a number  
23 of different ways? One way is executive orders; one way,  
24 signing statements. When they sign legislation into law,  
25 they have signing statements that tell agencies how the

1 president wants them interpreted. There are many  
2 different ways where presidents affect the execution of  
3 the laws.

4 MR. KLAYMAN: Absolutely.

5 THE COURT: I know you made this argument, but  
6 I'm not sure I really understand essentially what  
7 difference that makes. I want to make sure I'm not  
8 missing your point, Mr. Klayman. So what difference does  
9 it make?

10 MR. KLAYMAN: Well, the primary point is that  
11 what the president has done through these memoranda, which  
12 are executive actions, is not policy. He's enacting law.  
13 He's creating law. And he cannot override Congress in  
14 doing that under Article I, Section 1 of the U.S.  
15 Constitution; all legislative powers --

16 THE COURT: Why is it that you say it's not a  
17 policy? I mean, you know, I have information that's been  
18 submitted in the -- by you, actually, as part of the  
19 Department of Justice's OOC memorandum that the  
20 government's brief was talked about; that the resources in  
21 DHS to handle undocumented immigrants in this country, you  
22 know, only allows deportation of 400,000 out of the  
23 11-point some, 11-plus million such immigrants. So they  
24 have to figure out their enforcement priorities.

25 So why -- do you dispute those numbers, first of

1 all; and second of all, why isn't that an appropriate  
2 focus of administrative, administration policy of how they  
3 are going to take limited resources and target it even if  
4 you disagree with their targets, but why isn't that an  
5 appropriate function, first of all, of the president to  
6 give that kind of guidance through his cabinet secretaries  
7 and why isn't that appropriate?

8 MR. KLAYMAN: First of all, I might say, Your  
9 Honor, that this is not in any way an attack on this  
10 particular president. Presidents in the past have  
11 violated executive orders and courts have overturned them.  
12 This president, in fact, just about a year ago had one  
13 overturned with regard to the National Labor Relations  
14 Board where he did an interim appointment. It's not  
15 unusual for courts to overturn executive actions.  
16 Presidents do try to extend their powers as much as they  
17 can, and that's the reason why we have the courts and  
18 that's the reason why I'm proud to be in front of you,  
19 because you are the protector of the American people.

20 But let me get to the point. I don't dispute  
21 the numbers. But this president in particular has not  
22 been shy about asking for money for appropriations. We're  
23 now at a budget deficit of \$18 trillion. It's increased  
24 several trillion since he's been president. No request  
25 was ever made to Congress to increase the appropriation so

1 that border security could be enhanced and so people could  
2 be deported who are here illegally.

3 What's happened here -- and I don't mean any  
4 disrespect to the president -- is that he's trying to  
5 force the hand of the next Congress is that by putting in  
6 effect the law in effect -- in fact, he's made reference  
7 to that, some of the quotes I was going to read you, he's  
8 daring them to do what he wants and to enact. He said  
9 several times, 22 times in the past, that he's not an  
10 emperor. That he does not have the power to legislate as  
11 a president.

12 And that's the bottom line here. He did not ask  
13 for the money, but all of a sudden after the fact he and  
14 his colleagues at the Department of Homeland Security  
15 decide, well, we don't have the money so we have to leave  
16 all these people here. Here is an irony too --

17 THE COURT: Mr. Klayman, let me just say that,  
18 you know, I'm well aware of my power to undo executive  
19 actions of agencies. And I do exercise that power humbly  
20 when necessary. And I fully appreciate that you're  
21 inviting me in this case to protect Congress's prerogative  
22 to act in the immigration arena. But I have some pause,  
23 given the power of Congress to control purse, the purse  
24 strings, to tell the president exactly how Congress feels  
25 about whether the president's interpretation of the



1 immigration laws and enforcement priorities for the  
2 immigration laws are ones that Congress accepts or does  
3 not.

4 When it comes to deferred removal programs, the  
5 government's brief has outlined -- you know, the deferred  
6 removal programs have been longstanding in this country  
7 dating back to the 1970s. It was very interesting for me  
8 to read that and that Congress has, in fact, sanctioned  
9 the use of deferred removal programs in -- with reference  
10 to them embodied in the law.

11 So deferred removal programs per se are the  
12 kinds of enforcement prioritization that the executive  
13 branch has exercised over a number of administrations,  
14 over a number of years, at least 30, that Congress has  
15 sanctioned; and if Congress doesn't like it, doesn't  
16 Congress have the power to step in and address whatever  
17 misprioritization it thinks is going on here without the  
18 Court accepting your invitation and reaching out to  
19 intervene in this Legislative-Executive Branch squabble?

20 MR. KLAYMAN: You asked a really good question  
21 that has a number of different responses to it. First of  
22 all, we're talking here about, first talked about  
23 appropriation. We cited a Supreme Court case called  
24 *Chadha* where President Nixon decided he wasn't going to  
25 spend money that Congress had appropriated. Supreme Court

1 said, No, you can't make that decision. You can't  
2 override Congress; the money has been appropriated. This  
3 money has been appropriated maybe ipso, after the fact the  
4 president said it's not enough, but it's been appropriated  
5 for enforcement for deportation.

6 THE COURT: Well --

7 MR. KLAYMAN: He's shutting -- he's shutting  
8 down the potential of deportation.

9 THE COURT: But Mr. Klayman, this is not a case,  
10 I really -- I looked at *Chadha*, I appreciate how you're  
11 using *Chadha* in this case, but I really fail to see how  
12 *Chadha* is applicable here where *Chadha* was a blatant, you  
13 know, response by the president to the Congress, You've  
14 given me money and told me how you want me to spend it.  
15 I'm just not going to spend it the way you want. That is  
16 an appropriate role for the Court to step in and say No,  
17 no, no, you can't -- you are not the emperor, you have to  
18 follow the directions.

19 This program is a deferred removal program, you  
20 know, as I said, longstanding practice for prioritization  
21 of resources that have been provided by Congress. I just  
22 don't see how *Chadha* is at all applicable here.

23 MR. KLAYMAN: *Chadha* is applicable on two  
24 different grounds. One, with regard to purse strings or  
25 something for the Congress to decide, and Congress has

1 appropriated this money for use in large part in  
2 deportation proceedings against illegal aliens.

3 Secondly --

4 THE COURT: I do think *Chadha* would be  
5 applicable if Congress passed a law saying to the  
6 president, You may not expend any funds for the DACA  
7 program, the revised, you know, DACA program, the revised  
8 DACA program or the DAPA program. Then if the president  
9 proceeded, I think then you might have a *Chadha* issue.  
10 But that's not what happened.

11 MR. KLAYMAN: Let me tell you respectfully, Your  
12 Honor, why you have it, Your Honor, just teeing the  
13 question up. That's why I started with that aspect of  
14 your question is because the money is being used not for  
15 purposes which it was appropriated, which was immigration  
16 enforcement of the current law, but if you look at these  
17 memoranda, they are deferring benefits which go part far  
18 beyond the current law.

19 For instance, it's in effect granting amnesty  
20 and immunity from prosecution authority. It's their  
21 employment authorization cards for the right to work,  
22 regardless of whether you're legal or illegal; the  
23 opportunity to use the law to get a work authorization  
24 card to get a state driver's license. From that you can  
25 get the right to vote -- not the right to vote but you can

1 present it and no questions are asked and sign up on the  
2 register to vote. Plus there are background checks here  
3 for nearly 5 million illegal immigrants. This costs  
4 money.

5 THE COURT: Mr. Klayman, really this is not a  
6 case about purported voter fraud. Is that what you're  
7 saying one of the harms is, voter fraud?

8 MR. KLAYMAN: It can be one of the harms. It's  
9 not something we put into the affidavit, but it can be.  
10 What I'm saying to Your Honor is is that the monies are  
11 being used for purposes that were not appropriated by  
12 Congress to use the monies for, and I just listed various  
13 aspects of that, including background checks for  
14 potentially 5 million illegal aliens. There has never  
15 been -- and this is the third part in answer to your  
16 question -- there's never been any deferred action here on  
17 this grand scale. 5 million people, nearly half of the  
18 illegal immigrant population. It's never been done to  
19 that extent.

20 I'm not condoning what President Bush did  
21 earlier for 1.2. But he didn't have all these different  
22 aspects to it when money was being spent for purposes that  
23 Congress had not authorized it for. And that's a  
24 important aspect here. This is a very expensive --

25 THE COURT: Are you saying, Mr. Klayman, that

1 the old, the longstanding prior deferred removal programs  
2 implemented from the '70s up to today did not carry with  
3 them a work permit certificate? Is that -- is that the  
4 factual matter of what you're saying, that this deferred  
5 removal program differs because it has a work certificate  
6 authorization?

7 MR. KLAYMAN: Some of them -- I'm sorry, I  
8 didn't mean to interrupt you. Some of them did not, yes.

9 THE COURT: But some of them did.

10 MR. KLAYMAN: I'm not sure. I'm trying to be --  
11 I haven't studied the prior ones, okay.

12 In any event, what we said in our brief was it  
13 doesn't matter what other presidents did. We're  
14 challenging this now. And I can tell you if you know my  
15 reputation -- I think you do -- I gave President George W.  
16 Bush a pretty hard time. I just don't bring cases with  
17 regard to Democrat [sic] presidents. I sued them over  
18 warrantless wiretaps. The Cheney Energy Task Force. I'm  
19 thought of as a Libertarian conservative. My supporters  
20 weren't that kind to me over doing that.

21 I'm doing this on the basis of principle, and so  
22 is Sheriff Arpaio. It doesn't matter what Bush did in the  
23 past or Clinton or anybody else, this is not right and  
24 it's not legal.

25 And there are many aspects that go beyond the

1 work permits. They are dealing with background checks for  
2 nearly 5 million illegal aliens; and one of the problems  
3 here -- and we can to this later if you want, is that it's  
4 a blanket, in effect, amnesty to these people, because --

5 THE COURT: So can we go back to my original  
6 question?

7 MR. KLAYMAN: Yes.

8 THE COURT: Which is, I'm not sure I really  
9 fully understand your answer. Putting aside the revisions  
10 to the DACA program and the DAPA program, which are fairly  
11 of recent vintage, how can you establish irreparable harm  
12 from a program that you're only suing on two years after  
13 it came into effect, the DACA program?

14 MR. KLAYMAN: Number one, as set forth in the  
15 affidavit, since this has gone into effect on November 20,  
16 2014 --

17 THE COURT: Oh, you're back to the bomb threats.

18 MR. KLAYMAN: No, not the bomb threats. What  
19 happens here is that illegal aliens who are turned over by  
20 the sheriff's office -- and this is primarily a case about  
21 his office. I just mentioned one aspect, personal aspect  
22 of it, but that's a very small part of this case. It's  
23 about the function of his office, which strains his  
24 resources and takes away law enforcement priorities to do  
25 things which unfortunately are not productive because of

1 the executive action of this president is that he turns  
2 over after sentences are fulfilled in his jail --

3 THE COURT: I do understand --

4 MR. KLAYMAN: -- and then they come back.

5 THE COURT: Part of your argument is that these  
6 three programs, DACA, revised DACA and the DAPA program  
7 are going to be a magnet for other immigrants to come  
8 illegally into the country. And that because of that  
9 magnet it's going to burden the resources of the  
10 plaintiff's sheriff's office. Do I have that right?

11 MR. KLAYMAN: No, that's just one part. That's  
12 a small part. That's what the government would like you  
13 to believe, okay. We're taught in law school, always  
14 shape the argument in the most favorable light. That  
15 argument is extremely disingenuous.

16 THE COURT: Well, that's why you're here,  
17 Mr. Klayman.

18 MR. KLAYMAN: Right.

19 THE COURT: So that you can respond. You asked  
20 for oral argument, so here you are.

21 MR. KLAYMAN: Okay. And I used to be a Justice  
22 Department lawyer too, so I know how we're taught, keep it  
23 simple. KISS over at the department. They want to keep  
24 it simple, it's not that simple. The reality is -- and  
25 this is where most of the harm comes in and it's set forth

1 in the supplemental affidavit in particular -- is that  
2 illegal immigrants who are serving time for crimes, when  
3 those sentence are concluded, are turned over to ICE, to  
4 DHS, the immigration authorities. Because the deportation  
5 laws were not being enforced or for that matter any other  
6 immigration law that's related thereto, these criminals  
7 wind up back in the jail, they wind up getting rearrested  
8 and that costs -- we detailed over \$9 million of greater  
9 costs, which included part of this period.

10 THE COURT: Mr. Klayman, this is the fallacy,  
11 the logical fallacy that I perceive in that argument:  
12 Those are harms that the plaintiff is claiming even before  
13 the DACA program or the revised DACA program have gone  
14 into effect. So how can these programs that you're  
15 seeking to stop have any causative effect or  
16 redressability possibility for those particular harms that  
17 you have laid out in the plaintiff's original affidavit  
18 and the supplemental affidavit? And redressability and  
19 causation? Prerequisites for standing here.

20 MR. KLAYMAN: Let me turn your attention first  
21 to Paragraph 38 of the supplemental affidavit. Based on  
22 the average length of stay, I estimate that Maricopa  
23 County incurred an additional expense of \$9,293,619.96  
24 from February 1, 2014, through December 17, 2014. That's  
25 over a month -- that's about a month since this was



1 implemented. So there is an overlap. They are continuing  
2 to get these illegal immigrants who have been released  
3 come back into the jails, which are incurring expense. So  
4 yes, it does fall within the time period after this  
5 presidential memorandum was implemented on November 20.  
6 So that's in the record, Your Honor.

7 THE COURT: But it hasn't been implemented yet.  
8 It's been announced, but I think it has a 180-day lag  
9 period even before, you know, applications for eligibility  
10 determinations are made. Am I right on that date?

11 MR. KLAYMAN: Your Honor, having relied upon the  
12 argument in the Justice Department's brief, which was  
13 frankly misleading, notice that they didn't submit one  
14 affidavit. They did not go under oath on anything. They  
15 didn't want to put their money where their mouth is.  
16 There is nothing in that record which contravenes our  
17 affidavit. They just threw in a bunch of documents. Why  
18 didn't they go under oath and swear what was going on,  
19 because what we know --

20 THE COURT: But Mr. Klayman, let's not -- let's  
21 not play to the gallery here. We all understand as  
22 lawyers, that it is your burden, not the government's to  
23 establish standing. It's your burden to introduce the  
24 affidavits --

25 MR. KLAYMAN: And we have.

1 THE COURT: -- to establish your standing. The  
2 government doesn't have that burden.

3 MR. KLAYMAN: It's a very low threshold at this  
4 point. Let me tell you why on standing. But let me back  
5 up on this. I just read to you one paragraph, more than  
6 one paragraph in the supplemental affidavit which deals  
7 with what's happening and how it's increasing costs to  
8 Maricopa County since these memoranda opinion were issued.  
9 In addition, we have set forth --

10 THE COURT: Because of the magnet effect?

11 MR. KLAYMAN: I'm not talking about magnet.  
12 Yes, there is a magnet, that's another aspect, but it's  
13 because illegal immigrants that have been arrested for  
14 crimes, for state crimes -- we don't enforce the federal  
15 immigration law, the United States has already, the U.S.  
16 Supreme Court said no, that's a federal province. I was  
17 actually part of that case as an amicus, because people  
18 who have been arrested, illegal immigrants for state  
19 crimes, once they serve their sentence are let out and  
20 turned over to ICE. They then are not in any way deported  
21 or having any action taken against them. They are let out  
22 into the Maricopa County community; they commit other  
23 crimes and they wind up back in the jail at a rate of  
24 36 percent approximately.

25 THE COURT: And for --

1 MR. KLAYMAN: This has happened since the  
2 memorandum has come out.

3 THE COURT: Let me ask you, these are people who  
4 have committed, as you said, by your definition a state  
5 crime, been arrested for a state crime; whatever happens  
6 to them in the state criminal justice system happens and  
7 then they are turned over to ICE for processing. And what  
8 you're saying is that instead of -- ICE instead of  
9 deporting them releases them. Do I have that right?

10 MR. KLAYMAN: Well, they are not ordered to  
11 release them. If it's not a major crime, they are ordered  
12 to release them under this deferred action program. They  
13 are back out into the public domain, they are being  
14 rearrested for committing other crimes and they wind up  
15 back in the jail. These people are repeat offenders.

16 THE COURT: Your complaint is because one of the  
17 eligibility requirements for the DAPA program is that the  
18 particular undocumented immigrant does not fall within one  
19 of the categories of enforcement that's set out in the  
20 memorandum on enforcing, you know, that sets out the  
21 priorities 1, 2 and 3 for enforcement. Is that right?

22 MR. KLAYMAN: It could be a case, but it's also  
23 the case that this administration just simply is not even  
24 enforcing that aspect of things. Because what they're  
25 doing is they are just letting people out who have

1 committed crimes rather than -- if you commit a crime, you  
2 generally get deported, no matter what that crime may be,  
3 notwithstanding this criteria.

4 THE COURT: Well, as I've read the plaintiff's  
5 affidavit, he has a complaint that undocumented immigrants  
6 that are picked up by the Maricopa County Sheriff's  
7 Department, processes them and then they are turned over  
8 to ICE are being released. And that is the complaint that  
9 I take it predates the DACA program, the revised DACA  
10 program and the DAPA program; right?

11 MR. KLAYMAN: It's been a running complaint, but  
12 what happened here, Your Honor, is an exacerbation. I'm  
13 going to get to standing cases in a second. This is an  
14 exacerbation of the current situation, because it's not  
15 just that some of them, 36 percent, are coming back; but  
16 now under this program, this executive action, they are  
17 all going to be out there unless they commit some heinous  
18 crime. They are all going to be out in the community,  
19 vandalizing, assaulting, whatever the case may be. They  
20 are out there and they are coming back to the jails. And  
21 that increases the costs, and we documented from that time  
22 period I just read to you, increased it over \$9 million.  
23 And that goes into the period after the president's  
24 executive action took effect.

25 Now, we also gave you the other day a case by

1 Judge Schwab in the Western --

2 THE COURT: Well, you keep saying "in effect,"  
3 but what you mean is after the president's policies were  
4 announced, they are not in effect. And they are not even  
5 accepting applications, I think, until 180 days after the  
6 November 20 announcement; right?

7 MR. KLAYMAN: They are in effect -- you have 180  
8 days to apply, okay.

9 THE COURT: Right.

10 MR. KLAYMAN: Okay. They are in effect right  
11 now. You can apply right now.

12 In addition, as is in the record, the Department  
13 of Homeland Security is hiring thousands of other  
14 employees to process. Now, granted these applications --  
15 and here is another irony. They put in effect a fee of  
16 \$465 to apply. How many illegal immigrants are going to  
17 come to the surface here and show their face when they  
18 have to ante up \$465? Most of them in all likelihood want  
19 to remain illegal rather than having to pay it. The  
20 president's policies, and I'll get to that later --

21 THE COURT: Let me just say, it was curious to  
22 me to read in your briefs your expressions of concern over  
23 undocumented immigrants paying \$465 to make their  
24 application for their eligibility review for the revised  
25 DACA program and the DAPA program and your concern that

1 they may not get a refund of their money. I take it  
2 you're not here on behalf of the undocumented immigrants  
3 who may be eligible for these programs.

4 MR. KLAYMAN: I'm not here on behalf of them,  
5 Your Honor; but as an aside, if you know anything about  
6 me, I'm not anti-immigration. In 1996 I did a  
7 presidential debate at the National Press Club that was  
8 trying to say that immigration is good for this country.  
9 I'm not anti. And that's the problem, people tar you with  
10 that, they think you're conservative, you're  
11 anti-immigrant, you're a homophobe and everything else.  
12 I'm not.

13 And the reality is that we are a system of laws  
14 and not men, as our second president, John Adams said.  
15 And those laws need to be respected. The precedent here  
16 is terrible. It's trashing our Constitution. It's more  
17 important than the immigration issue even. And that's  
18 what's at issue, and that's why the president 22 times  
19 said I can't do this, I'm not an emperor, why are you  
20 pressing on me? When it's politically convenient, then he  
21 does it. Other presidents have done the same thing, but  
22 that doesn't make it right and that's not precedent.  
23 What's precedent is the Constitution, that's what counts.

24 Now; let me get into the standing issues. Judge  
25 Helen Segal Huvelle, one of your colleagues, in a case,

1     *Honeywell Intern, Inc. v. EPA*, found that chemical  
2     manufacturers had standing because the challenged  
3     regulation could lead customers to seek out manufacturers'  
4     competitors in the future. She didn't require an absolute  
5     direct nexus for standing.

6             In fact, and this is ironic, the case involving  
7     SB 1070 -- and we also cited this case -- a Supreme Court  
8     case where the case was the U.S. Government and I was, I  
9     participated as an intervenor in that case, I represented  
10    the -- it tells you where I come from -- the Arizona  
11    Latino Republicans, Latinos, who were supporting that law,  
12    legal immigration. And in that case the Supreme Court did  
13    not throw the case out on standing, nor did the lower  
14    courts, but the administration was challenging whether  
15    these stop-and-ask situations by the police where they  
16    would stop someone on probable cause and ask for their  
17    immigration papers to see whether they were here legally.  
18    The administration was challenging that, and yet that law  
19    had not gone into effect yet. And standing was found by  
20    the lower courts and upheld by the Supreme Court.

21            THE COURT: Well, Mr. Klayman, you have put your  
22    finger on one of the critical issues for standing in this  
23    case, which is how much is the plaintiff's alleged injury,  
24    in fact, which has to be concrete and particularized for  
25    him to have standing in this case dependent on the actions

1 of multiple third parties in the form of undocumented  
2 immigrants. And when I look at, with all due respect, my  
3 colleague's opinions on this issue but, in fact, look at  
4 what binds me, which is the D.C. Circuit opinions, in  
5 cases such as *Crete Carrier Corp.* from 2004, the *National*  
6 *Wrestling Coaches Association* from also 2004, where the  
7 D.C. Circuit has made clear that when the injury, in fact,  
8 depends on what the conduct is of third parties, you've  
9 got a big standing problem. So how do you address those  
10 cases?

11 MR. KLAYMAN: These are not third parties here  
12 we're talking about. The president and his  
13 administration, the Department of Homeland Security is not  
14 third parties. This is a direct hit.

15 THE COURT: Well, the injury that the plaintiff  
16 is alleging here is because the -- as a result of the  
17 policies, third parties, undocumented immigrants are going  
18 to react in a particular way. One, they are going to use  
19 those policies as a magnet to come to the United States,  
20 increasing undocumented illegal immigration to the  
21 country; and two, that certain parts of those, that  
22 population are going to commit crimes.

23 MR. KLAYMAN: No --

24 THE COURT: That attacks the sheriff's  
25 resources.



1 MR. KLAYMAN: Okay. There you have it, Your  
2 Honor.

3 THE COURT: So it's those third parties --

4 MR. KLAYMAN: Yes, it's a direct impact on the  
5 sheriff's office. This sheriff stands in no different  
6 position than the 24 states that brought an action in  
7 Texas.

8 THE COURT: That case was not in front of me,  
9 and I don't think that that Court has yet opined on the --

10 MR. KLAYMAN: No, you're right, but there's a  
11 Court in the Western District of Pennsylvania that has  
12 opined and has found the president's actions  
13 unconstitutional, Western District of Pennsylvania, Judge  
14 Schwab.

15 THE COURT: Let's talk about that case. I found  
16 it a little bit --

17 MR. KLAYMAN: And he didn't opine. That's a  
18 ruling.

19 THE COURT: Some commentators have called that  
20 case complex. I just find it a puzzle. As I understand  
21 the context of that case, there was a defendant in front  
22 of the judge awaiting sentencing for illegal reentry, and  
23 the judge, as he was required to do, evaluated the  
24 sentencing factor, 18 U.S.C. 3553(a)(6), which calls upon  
25 sentencing courts to impose a sentence that avoids

1       unwarranted sentencing disparities among similarly  
2       situated defendants convicted of the same crime. And in  
3       the context of considering that factor, sentencing factor,  
4       unwarranted sentencing disparities among similarly  
5       situated defendants convicted of the same crime, reached  
6       out and decided that he had to decide the  
7       constitutionality of the DACA program in order to  
8       ascertain whether the time-served sentence called for in  
9       that case under the federal sentencing guidelines was,  
10      would result in an unwarranted sentencing disparity.

11               And then the Court -- the aspect of the case  
12      that puzzles me, among others, is that the Court concluded  
13      that this defendant wasn't eligible for the DAPA program  
14      and therefore was not similarly situated to defendants who  
15      might be eligible but then proceeded to evaluate the  
16      constitutionality of the program.

17               So it wasn't even having found that the  
18      defendant wasn't eligible for the DAPA program, that  
19      defendant was no longer -- was not similarly situated  
20      defendants who might be. I actually find it a real puzzle  
21      how he was able to then reach out and evaluate the  
22      constitutionality of this program, which didn't apply to  
23      the defendant in front of him.

24               MR. KLAYMAN: I didn't read it that way. Here  
25      is the way I read it.

1 THE COURT: All right.

2 MR. KLAYMAN: I read it that the defendant who  
3 was trying to change his plea, he was going to plea, was  
4 pleading to a crime where he could be deported under that  
5 provision. And the defendant was claiming, in effect the  
6 defense, that under this new DACA program, DAPA program, I  
7 should remain here, I don't want to be deported.

8 THE COURT: No, no, no. The defendant wasn't  
9 claiming that. In fact, the defendant didn't even raise  
10 this issue. The defendant was going to be sentenced to  
11 time served and didn't raise the issue at all. The Court  
12 sua sponte raised the issue, which is fine. Courts have a  
13 statutory obligation to consider that factor and look at  
14 the consideration for that factor. But I don't think the  
15 defendant even contended in the case, based on my reading  
16 of the opinion, that he was even eligible for the DAPA  
17 program.

18 MR. KLAYMAN: That's what I glean from it or  
19 whether it was expressed or whether it was implied, the  
20 defendant didn't want to be deported from the United  
21 States. So the judge reached that issue and he said, No,  
22 you're still subject to deportation because this was  
23 unconstitutional, you're not going to be able to have this  
24 umbrella.

25 THE COURT: Well, let me just say that case is

1 from another circuit. It's a District Court opinion, and  
2 because of the puzzling nature of how the judge reached  
3 the decision on the constitutionality, I really don't find  
4 it at all persuasive either. So let's, we can move on  
5 from the Pennsylvania District Court opinion.

6 MR. KLAYMAN: No, that's fine, but I was citing  
7 that, that there was a federal judge who found this  
8 unconstitutional. We got there from Texas as to whether  
9 Texas had anything to do with here.

10 THE COURT: Well, you raised it, Mr. Klayman. I  
11 just wanted to share with you my views so you wouldn't  
12 waste any more time.

13 MR. KLAYMAN: I understand. There are myriad of  
14 other cases that we cited in our briefs on standing. And  
15 one of them is *International Union of Bricklayers and*  
16 *Allied Craftsmen*, 761 F.2d 802, that is the D.C. Circuit  
17 in 1985, standing is found despite lack of details  
18 regarding specific future jobs. It was jobs impact into  
19 the future, not present. And standing can result -- we've  
20 ask for declaratory judgment here too, Your Honor, which  
21 is when harm is imminent. It doesn't actually have to  
22 occur right now, but it has to be imminent. So we have a  
23 declaratory judgment provision, too, as one of our counts.

24 THE COURT: With respect to your imminent harm,  
25 I did want to hear, Mr. Klayman, your response to the

1 government's argument that these, the deferred removal  
2 program because of its special targeting of priority  
3 enforcement, you know, immigrants, illegal immigrants,  
4 will actually help local law enforcement. So how do you  
5 respond to that argument?

6 MR. KLAYMAN: I don't think that's a sensical  
7 argument. It's not rationally based. It doesn't help  
8 local law enforcement to let people out on the streets who  
9 have committed crimes and are winding up back in the jail.  
10 It puts a strain on resources.

11 In the courtroom today is my brother. He's a  
12 policeman in Philadelphia. I wish he could come up here  
13 and testify. He knows all about that, criminals back on  
14 the streets in Philadelphia or anywhere else. And that's  
15 what's happening in Maricopa County. Maricopa County is  
16 the largest sheriff's office, at least in terms of land  
17 mass, in this country. It puts a great strain on the  
18 resources to have these people out there and not subject  
19 to deportation.

20 And that's the essence of our argument no matter  
21 how the government wants to couch it. You can't put  
22 lipstick on a pig. This is not a case about primarily  
23 drawing people to this country. This is a case about the  
24 burden on resources of this sheriff's office. It's  
25 already stretched incredibly thin, and that's what it's

1 about.

2 I know known Sheriff Arpaio for a long time. I  
3 never heard one negative biased remark against Latinos or  
4 I wouldn't represent him if he did. And SB 1070, I came  
5 in there and I told the Supreme Court, I said if Latinos'  
6 rights are violated in terms of stop and questioning and  
7 searched, Freedom Watch, my group, will be the first group  
8 that came to their defense. I lived in Miami for a long  
9 time. I represented the Cuban-American community, a lot  
10 of other communities. This is not about Latinos. This is  
11 about our laws and enforcing our laws.

12 THE COURT: I think I understand your arguments,  
13 Mr. Klayman. But if you have anything further, you can  
14 save it for your reply.

15 MR. KLAYMAN: Well, I did have a little -- I  
16 want to talk about the APA for a little, if I may.

17 THE COURT: All right.

18 MR. KLAYMAN: *National Resources Defense Council*  
19 *v. Environmental Protection Agency*, 643 F.3d 311 D.C.  
20 Circuit July 1, 2011, recent case. Wherein, you know,  
21 this is dealing with environmental protection, also  
22 questions of causation, because these questions are  
23 brought and standing is found with regard to APA edicts,  
24 some by executive order or memoranda which are to take  
25 effect in the future. Here is what's going to happen if

1       this goes into effect.

2               And standing has been found and preliminary  
3       injunctions have been granted. So there are a number of  
4       cases, Your Honor, and I know from the other case that we  
5       had that you're a very scholarly person and that you'll  
6       read those and have an open mind on this because this is  
7       not in any way geared against the Latino community or any  
8       other community. It's called protecting our Constitution.

9               With regard to the APA, there's a requirement  
10      when you have these kinds of substantive rights that are  
11      being doled out by presidential action or by an agency, an  
12      agency like the DHS whose memorandum that I enumerated  
13      before, there is a duty to have at least rule-making,  
14      notice and comment. And that's under Section 702 through  
15      706, notice and comment. And under 7062, 5 U.S.C. 7062,  
16      the Court must hold unlawful and set aside any agency  
17      which is "arbitrary, capricious and abuse of discretion or  
18      otherwise not in accordance with law; B, contrary to  
19      constitutional right" -- constitutional right is what is  
20      at issue here in part -- "power, privilege or immunity; or  
21      C, in excess of statutory jurisdiction, authority or  
22      limitations or short of statutory authority."

23              THE COURT: I know, Mr. Klayman, that under the  
24      APA should you prevail on your standing and the  
25      government's substantial challenge to standing here and

1 therefore this Court's subject matter jurisdiction, but  
2 let's say you prevail on that, as I appreciate that you  
3 said that one of the key major questions here is whether  
4 the programs that are challenged are a valid exercise of  
5 prosecutorial discretion, and, you know, I appreciate that  
6 you call them phony and disingenuous or the description of  
7 them is a valid exercise of prosecutorial discretion, you  
8 call that phony and disingenuous because the guidelines  
9 used a standardized approach and I was a little bit  
10 curious about that because it sort of seems like the  
11 Executive Branch is therefore sort of between a rock and a  
12 hard place.

13 If they have fairly clear guidelines for their  
14 enforcement priorities in the immigration arena, it's too  
15 standardized and, you know, you call it phony and  
16 disingenuous. But if they don't have very clear guidance  
17 somewhat, their priorities would be, they would certainly  
18 be subject to a challenge for being arbitrary, capricious  
19 and unreasonable under the APA. So where are you drawing  
20 that line --

21 MR. KLAYMAN: That's a good question.

22 THE COURT: -- with regard to what the APA  
23 program is in your view with these policies?

24 MR. KLAYMAN: First of all, why it is phony and  
25 disingenuous, no disrespect, I could have used stronger



1 language.

2 THE COURT: You could have used stronger  
3 language than phony and disingenuous? Those words sort of  
4 hopped off the brief to my eyes, fairly, you know,  
5 noteworthy.

6 MR. KLAYMAN: Okay.

7 THE COURT: In terms of your views.

8 MR. KLAYMAN: I could have used Woody Allen's  
9 expression, a sham was a sham was a sham. The reality  
10 here is that because the breadth is so broad and because  
11 it's clear to have prosecutorial -- prosecutorial  
12 discretion --

13 THE COURT: When you say "breadth," you mean the  
14 numbers?

15 MR. KLAYMAN: The numbers.

16 THE COURT: Okay.

17 MR. KLAYMAN: And there are no criteria to  
18 really determine, except a few criteria -- and I'll get  
19 into that -- what is at issue. So broad that an  
20 immigration enforcement person cannot possibly process the  
21 applications of 5 million illegal immigrants, and the law  
22 is clear, and even the Justice Department admitted in its  
23 earlier memorandum when the president said I can't be an  
24 emperor, is that you have to do it on a case-by-case  
25 basis.

1           So are we going to process 5 million illegal  
2 immigrants on a case-by-case basis? That's irrational.  
3 You talk about trying to save funds, and that's why it's  
4 phony and disingenuous. Just to process 5 million  
5 potential illegal immigrants for -- and using  
6 prosecutorial discretion is going to bust our budget to  
7 the point where we won't be able to do anything else at  
8 INS or anywhere else. You can't process that. And it  
9 requires a background check for either of them.

10           THE COURT: Why do you think it can't be  
11 processed? In the DACA program the government presented  
12 statistics that -- and you also challenged the DACA  
13 program -- that it resulted in a denial of 36,860  
14 applications as of December 5, 2014. So those are tens of  
15 thousands of denials that were done on a case-by-case  
16 basis.

17           MR. KLAYMAN: Out of 766,000 illegals. That's a  
18 very low percentage.

19           THE COURT: But it's not 100 percent. It's not  
20 a hundred percent that we're just rubber stamping.

21           MR. KLAYMAN: No, we never said 100 percent,  
22 Your Honor, but most of these people are getting through  
23 the system. They are not being processed. That's why  
24 this is irrational is that you can't. There's no rational  
25 basis for us to process 5 million people doing background

1 checks with personnel. That's why there's an immediate  
2 impact. That's why they are hiring more people right now.  
3 The people they are hiring isn't even enough. This is all  
4 a manipulation to have the president step in to try to  
5 force the hand of Congress to meet his political promises  
6 that he made years ago. And right now the president --  
7 and I don't mean this in a political sense, but he appears  
8 not to even care about his own party anymore. He's doing  
9 what he wants to do.

10 THE COURT: All right, Mr. Klayman. I think --

11 MR. KLAYMAN: Can I say one last thing?

12 THE COURT: One last thing.

13 MR. KLAYMAN: Yes, one last thing and that is  
14 that Your Honor's duty, in all due respect, and I know you  
15 take it seriously, is to enforce the law. And with regard  
16 to the rule-making in these presidential memorandum, and  
17 there's a couple of examples there, one is dealing with  
18 changing --

19 THE COURT: How about presidential memoranda,  
20 let's be clear. They are DHS --

21 MR. KLAYMAN: The president signs off of them,  
22 but they do come out of DHS. Even in those memoranda we  
23 cited in our brief where DHS and the president are  
24 admitting they have to do rule-making such as changing  
25 visa requirements based on employment. They in effect

1 have shot themselves in the foot with that admission in  
2 terms of the APA, because at a minimum they should have  
3 done rule-making here. Thirty days notice and comment,  
4 the American people have a right to comment on this, and  
5 what we're asking is not a lot. We're just saying, Your  
6 Honor, enjoin this and allow for rule-making, let them,  
7 let them publish a rule as they should do under the APA.  
8 Because we meet the requirements here for a rule. And  
9 courts have done that before. I realize this is a real  
10 big --

11 THE COURT: Mr. Klayman, you surprise me with  
12 your last comment. Because I had read your complaint as  
13 asking me to enjoin these programs as an unconstitutional  
14 violation of separation of powers and not just to stop  
15 them for a rule-making, notice of comment rule-making to  
16 take place. Am I wrong on that?

17 MR. KLAYMAN: Yes. And as I just read to you  
18 under 706, arbitrary and capricious and abuse of  
19 discretion are otherwise not in accordance with law. This  
20 is arbitrary, capricious and abuse of discretion.

21 THE COURT: Right. I'm just reading Count I of  
22 your complaint.

23 MR. KLAYMAN: And are contrary to constitutional  
24 rights.

25 THE COURT: Excuse me, Mr. Klayman, I'm reading

1 Count I of your complaint that says that it violates the  
2 Constitution and Paragraph 52 is ultravirus and you want a  
3 declaratory judgment to that effect to stop it in its  
4 tracks.

5 MR. KLAYMAN: Right. And the second count talks  
6 about violation of rule-making requirements.

7 THE COURT: Right.

8 MR. KLAYMAN: Third cause of action, violation  
9 of existing regulatory authority and we cite the APA, 5  
10 U.S.C. 702 through 5 U.S.C. 706. This is not rocket  
11 science when it comes to the APA. When I was a Justice  
12 lawyer I represented the FDA, Consumer Product Safety  
13 Commission and the Federal Trade Commission. I had to  
14 defend regulations that were promulgated, some without  
15 notice and comment. And when the agency messed up, they  
16 had to go back and redo it or the Courts enjoined it.

17 THE COURT: All right. Thank you, Mr. Klayman.

18 MR. KLAYMAN: Thank you. I appreciate your  
19 questions and time.

20 THE COURT: And Ms. Hartnett.

21 MS. HARTNETT: Thank you, Your Honor. I'd be  
22 happy to address any specific questions that the Court  
23 has.

24 THE COURT: Yes. I mean, Mr. Klayman has raised  
25 this issue about, you know, undocumented immigrants

1 eligible for those programs who are accepted into the, I  
2 guess, both the DACA program and the revised DACA program  
3 and the DAPA program as receiving a certificate. Could  
4 you explain, what is this certificate?

5 MS. HARTNETT: I think that's a reference to an  
6 employment identification card, so when the person applies  
7 for either the DACA program or DAPA program, they both  
8 make an application for deferred action which is reviewed  
9 on a case-by-case basis and they also make an employment  
10 authorization card. And I believe that card, if it were  
11 to be issued, would be a piece of documentation that would  
12 identify the person as having received deferred action.

13 THE COURT: And does that -- and so the  
14 undocumented immigrant who receives this certificate, does  
15 the person get a Social Security number so if they do, if  
16 the person does get employment the person can pay taxes  
17 and enter the Social Security program? Is that also part  
18 of it?

19 MS. HARTNETT: Your Honor, I want to make sure I  
20 don't go beyond what we put before the Court in the brief,  
21 but I believe they do receive an identifying number which  
22 will allow them to have taxes taken from their wages going  
23 forward. This is part of, again, not the DACA and DAPA  
24 program itself but part of a pre-existing regulatory  
25 scheme that's been in place since 1981 which includes

1 people receiving deferred action among many other groups  
2 of people under the immigration laws as eligible for  
3 employment authorization while they are in that status  
4 which, again, is a temporary status that could be revoked  
5 at any time but allows them employment during that time  
6 period.

7 THE COURT: And one of the things that I talked  
8 to Mr. Klayman about is whether any of the other fairly  
9 long-standing deferred removal programs that have been  
10 implemented over the past 20, 30 years, did those also  
11 have this work certificate accompanying the grant of the  
12 deferred removal, you know, status?

13 MS. HARTNETT: Yes, Your Honor. I mean, among,  
14 one of the most significant examples would be the 1990  
15 Family Fairness Program, which you'll see an opinion in  
16 our brief that applied to 1.5 million people and also  
17 included ability to apply for employment authorization.  
18 And, again, that would be something that would be standard  
19 regardless; if someone is in the deferred action category  
20 and has received deferred action according to preexisting  
21 regulation, they would be able to apply for employment  
22 authorization.

23 THE COURT: Okay. Now, one thing that I also  
24 wanted clarification on is in footnote 23 of your brief  
25 you cite statistics regarding the applicants under the

1 DAPA program, and you state that 42,632 applications have  
2 been rejected and 36,860 applications were denied. What's  
3 the difference between a rejection and a denial?

4 MS. HARTNETT: Thank you for asking and sorry we  
5 didn't provide that information in our brief. The  
6 rejection is something that -- and we can provide  
7 additional information to the Court if necessary. But a  
8 rejection would be something that would be facially not  
9 complying with the requirements, for example, maybe  
10 lacking a signature. I believe it was only one of the  
11 substantive requirements of the DACA program that would be  
12 kind of a facial basis for just rejecting the application  
13 and sending it back, and I think that was if the person  
14 was above the age of 30. I can confirm that.

15 But I think the most relevant statistic -- that  
16 is a relevant statistic because it shows some initial  
17 vetting going on and then the 36,000 number would be  
18 people whose application was actually processed and  
19 considered but rejected, and that could be for not meeting  
20 the other criteria or, as the DACA program sets forth,  
21 because discretion was determined to be inappropriate  
22 under a case-by-case basis.

23 THE COURT: Because Mr. Klayman, you know, did  
24 suggest that the 36,860 number of denied DACA applications  
25 was, you know, fairly low as a percentage of the total



1 numbers deemed eligible and granted. But, you know, I do  
2 think it's important to point out that there was this  
3 other 42,000, right.

4 MS. HARTNETT: That's correct.

5 THE COURT: That were rejected.

6 MS. HARTNETT: And also if I can add that it  
7 makes sense, the lower rate there is a significant rate,  
8 if not an extremely high rate. It does take some, for a  
9 person to come forward and identify themselves, one would  
10 imagine they want to met the criteria in light of what  
11 that meant to actually identify yourselves to the  
12 authorities. So at some level it seems reasonable that  
13 there be a relatively high rate of people to be accepted  
14 because one would have to be careful to make sure they met  
15 the criteria before they identified themselves.

16 THE COURT: The plaintiff has raised this in  
17 support of his irreparable harm requirement for  
18 preliminary injunctive relief as well as in support of his  
19 showing of an injury in fact to establish the necessary  
20 standing in the case that there are undocumented  
21 immigrants who commit crimes or picked up by the sheriff's  
22 office and then released to ICE and released into the  
23 community again and commit other crimes. And as I  
24 understand Mr. Klayman's argument -- and I'm sure he'll  
25 have an opportunity to apply and correct me if I'm

1 wrong -- but as I understand Mr. Klayman's argument, when  
2 the Maricopa County Sheriff's Office now takes these  
3 undocumented immigrants, turns -- who are committing state  
4 crimes, processed through the state system, turns them  
5 over to ICE, if they are eligible for this program they  
6 are just going to be released into the community again.  
7 So what happens to individuals in terms of their  
8 eligibility for either the DACA or the DAPA program if  
9 they've committed a crime on their deferred removal  
10 status?

11 MS. HARTNETT: Your Honor, so in the first place  
12 the person would likely, you know, not be eligible for  
13 DACA or DAPA if they had a significant criminal offense,  
14 and both of those programs incorporate into them a  
15 requirement that the person not be convicted of a  
16 significant crime and not be a national security or public  
17 safety threat.

18 So that's an initial response as to why --  
19 there's several reasons why there's no nexus between these  
20 programs and the harms that are being alleged here, but  
21 that would be one of them.

22 But even assuming that the person had at some  
23 point committed a crime again, no basis in the record for  
24 concluding that, the status is revocable at any time.  
25 When I say "status," I mean the deferred action category.

1 When someone receives deferred action, it may be revoked  
2 at any time. They could be deported at any time. That  
3 could be another potential option for someone, if there  
4 were a hypothetical person who received DACA and DAPA and  
5 nonetheless committed a crime after that.

6 Again, there's no record evidence at all that  
7 any of the people about whom he's complaining were people  
8 that had received DACA or DAPA and then went on to commit  
9 a crime in the community. He seems to be, as the Court  
10 was indicating, challenging some other aspect of  
11 immigration enforcement at the federal issue that's not  
12 really at issue in this case.

13 THE COURT: All right. Could you clarify for  
14 me, because maybe it's just confused in my head, the  
15 effective date of the DAPA program and the revised DACA  
16 program, because I thought the revised DACA program had a  
17 90-day date before it became effective and the DAPA  
18 program had 180-day date to be effective.

19 So could you just explain how those two dates  
20 operated. Are they effective now, as Mr. Klayman says,  
21 and the government's just receiving applications for a  
22 90-day period and a 180-day period? Could you just  
23 explain whether I'm confused on the effective date.

24 MS. HARTNETT: No, you're not confused, and the  
25 programs are pursuant to memoranda. The terms of the

1 memoranda are not yet in effect. The revised DACA program  
2 applications should be, begin to be received starting on  
3 February 18 of 2015, approximately, but that would be the  
4 date, the 90-day date from the date of announcement. And  
5 for the DAPA program, that would take you to May 19, 2015,  
6 to even be able to submit an application. Because at that  
7 point there would still have to be a period of time for  
8 the consideration of the application, so even those dates  
9 would not be dates of necessarily beginning to grant  
10 requests under those applications.

11 Now, there is the ongoing DACA process from  
12 2012, and that continues. But these, the revisions to the  
13 process will take effect pursuant to the memoranda.

14 THE COURT: So just so we're absolutely clear,  
15 the earliest date that anybody could be granted a DAPA  
16 deferred removal status is 180 days after November 20; is  
17 that right?

18 MS. HARTNETT: Correct, for DAPA, yes.

19 THE COURT: All right. Okay, good. I wanted to  
20 clarify that myself.

21 All right. Is there anything else you want to  
22 add to your papers?

23 MS. HARTNETT: If I could just make a couple of  
24 quick points. I wanted to react to one, there was some  
25 dispute here about what exactly was being complained of,

1 and I would direct the Court's attention to, among other  
2 things, Paragraph 16 of the supplemental declaration where  
3 the declarant does make the point that he seems to be  
4 attacking President Obama's six years of promising what is  
5 in effect amnesty, so I think again kind of to the point  
6 of another indicia here that we have a generalized  
7 grievance or a political dispute as opposed to an actual  
8 concrete dispute.

9 THE COURT: Well, I mean, Mr. Klayman's papers  
10 do refer to these programs, the challenged programs, DACA,  
11 revised DACA and DAPA as an amnesty. Does the government  
12 view them as an amnesty in any way, and why not?

13 MS. HARTNETT: No, Your Honor, we don't, and I  
14 think the repeated use of that term kind of obscures the  
15 actual nature of the program, which is the temporary  
16 deferral of deportation to allow the government to focus  
17 on its most critical pressing threats which include border  
18 security threats and national security and public safety  
19 threats and serious criminals. So this does not provide a  
20 legal status or a pathway to citizenship but is in essence  
21 a way to put a group of cases to the side after  
22 individualized consideration to really allow the  
23 enforcement authorities to really focus on the most  
24 critical priorities in light of limited resources.

25 THE COURT: But it is an amnesty to the extent

1 that if somebody who has been granted this deferred  
2 removal status is picked up by immigration authorities,  
3 they do get an amnesty from being deported; is that right?

4 MS. HARTNETT: They have their card that will  
5 provide the identification of them as a deferred action  
6 person, but at the same time, as I pointed out, that would  
7 be revocable at any time. To the extent that there would  
8 be some reason to revoke that at that time, they would be  
9 able to have that opportunity.

10 So, again, it's not an amnesty in the sense of  
11 creating any legal right or entitlement for the person.  
12 The person is simply put to the side as a matter of  
13 administrative convenience with some -- to help focus the  
14 efforts of the enforcement authorities in the meantime in  
15 light of the severe resource constraints that the agency  
16 faces.

17 THE COURT: All right. Anything else you want  
18 to respond to?

19 MS. HARTNETT: No. I guess one other just point  
20 of clarification about the funding of the program. There  
21 was some discussion about whether this would be taking  
22 resources away from the enforcement efforts to have to pay  
23 for the administration of the DACA and DAPA programs. And  
24 I think among other places at page 26 of the OOC opinion,  
25 but as the plaintiff acknowledges, there will be fees

1 collected and this will be funded through that. So as the  
2 OOC opinion pointed out, there would not be any indication  
3 that there would be a strain of resources for removal  
4 efforts by having the DAPA and DACA programs exist.

5 THE COURT: Thank you. Mr. Klayman.

6 MR. KLAYMAN: A few points. Some of the  
7 commentary that we heard in answer to your first question,  
8 it's not on the record, Your Honor. And there's no backup  
9 for that. So we ask Your Honor not to regard that in  
10 writing your opinion ultimately. Also I want to thank you  
11 for moving this case along quickly, because however you  
12 rule, it's clear this is probably going to the Supreme  
13 Court at some point.

14 THE COURT: I wouldn't predict.

15 MR. KLAYMAN: Make you more famous.

16 THE COURT: In this room I think you are the  
17 most famous person, Mr. Klayman.

18 MR. KLAYMAN: I'm glad you didn't say -- third  
19 point, with regard to injury, *United States v. Mills*,  
20 violation of the Constitution in and of itself has been  
21 found by the Supreme Court to give rise to irreparable  
22 injury.

23 The other thing I might add, and this was what  
24 was not stated accurately, is that in the memoranda today  
25 that are at issue here that you clarified at the beginning

1 of this hearing, it states explicitly that enforcement is  
2 to stop immediately. Everything stops to allow these  
3 people to come out from, you know, underground and come  
4 forward. And I ask you --

5 THE COURT: Where is that in, in which  
6 memorandum are you talking about? Are you talking about  
7 the November 20<sup>th</sup> memoranda?

8 MR. KLAYMAN: Yes. It's Exhibit D, Your Honor.

9 THE COURT: I mean, I'm looking another  
10 document, ECF 6-4, and on page 3 of that document where it  
11 states -- it has a justification for the case-by-case  
12 exercises of deferred action to encourage people to come  
13 out of the shadows, submit to background checks and so on,  
14 but I didn't see any reference in here to stopping removal  
15 proceedings for the priority, undocumented immigrants.

16 MR. KLAYMAN: If you look at page 5, it's the  
17 corollary what's being set there. It's implicit in that.  
18 Wherein it says, "ICE and CBP are instructed to  
19 immediately begin identifying persons in their custody as  
20 well as newly encountered individuals who meet the above  
21 criteria and may thus be eligible for deferred action to  
22 prevent the further expenditure and enforcement resources  
23 with regard to these individuals."

24 So what they are saying is we want to identify  
25 these people immediately because we don't want to have



1       them subject to deportation so as to prevent the further  
2       expenditure of enforcement resources. So it does have  
3       immediate effect in that regard. And the other two  
4       paragraphs are similar.

5               So that's the immediate harm. And -- but it  
6       doesn't have to be immediate harm. It has -- it can even  
7       just be imminent harm or respective harm, and that's  
8       what's important here.

9               And with regard -- we feel firmly Your Honor  
10      should make a ruling on the constitutionality, whether you  
11      agree with us or not. We ask that you make a ruling on  
12      that. But even under their concept of, this is not going  
13      to kick in --

14              THE COURT: So just like the judge in  
15      Pennsylvania, even if I don't have to and I don't have a  
16      case in controversy in front of me that entitles me as a  
17      Federal judge to make a ruling, you want me to just opine?

18              MR. KLAYMAN: We don't want you to be like the  
19      judge in Western District. We want you to be yourself.  
20      But the reality is you have to reach that issue because  
21      there is a case of controversy here and there is a  
22      constitutional issue, and it falls within the scope of  
23      Section 706 of the APA. That's one of the reasons why you  
24      should invalidate what they did under the APA. You have  
25      to reach the constitutional issue. I read that a couple

1 times.

2 But in addition, what I'm trying to say is that  
3 under their scenario of when this thing kicks in, you can  
4 make a ruling, an expedited ruling that they have to have  
5 notice and comment, 30 days. Since they are claiming that  
6 this is not going to take effect until some time in  
7 February, that if Your Honor makes a quick ruling they are  
8 going to have to do notice and comment and the American  
9 people are going to have a right to respond.

10 THE COURT: All right. Well, Mr. Klayman, let  
11 me just, you know, satisfy the curiosity of people who are  
12 listening. I am not prepared to issue a ruling today,  
13 although I appreciate all the points you've made about the  
14 importance of this issue and I will -- I do plan to be  
15 issuing an opinion very shortly on both your pending  
16 motion for a preliminary injunction and the government's  
17 pending motion to dismiss for lack of subject matter  
18 jurisdiction.

19 So you've all given me a lot to think about on a  
20 number of cases to review, and you've been presenting  
21 documents up until last night. And so I want an  
22 opportunity to fully consider those before I issue my  
23 ruling.

24 MR. KLAYMAN: Actually we filed last night  
25 because the ECF system was down.

1 THE COURT: I know. Sorry about that.

2 MR. KLAYMAN: We wanted -- we e-mailed them  
3 their document days ago so they would have it. But what I  
4 was basically saying the last point, if I may make a  
5 possible suggestion. You could issue an order quickly on  
6 the notice and comment and defer on the rest of it,  
7 because it's quite clear that this was not a policy, and  
8 even if it was, it would have to be under notice and  
9 comment. And if you issue that quickly, then it will give  
10 them the 30 days to publish the notice and comment. That  
11 should have been done, they admitted that in the memoranda  
12 with regard to other types of actions that they took such  
13 as visa status with regard to change of employment.

14 Thank you, Your Honor. I appreciate your time.

15 THE COURT: Thank you.

16 Thank you. You are all excused.

17 (Proceedings adjourned at 10:49 a.m.)  
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19  
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CERTIFICATE OF OFFICIAL COURT REPORTER

I, Barbara DeVico, certify that the foregoing is  
a correct transcript from the record of proceedings in the  
above-entitled matter.

A handwritten signature in cursive script, reading "Barbara DeVico", is written over a horizontal line. The signature is in dark ink and is positioned on the left side of the page, corresponding to the "SIGNATURE OF COURT REPORTER" label.

12-29-14

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DATE